

Fabrizi v 1095 Ave. of the Americas, L.L.C.

2011 NY Slip Op 31529(U)

June 6, 2011

Sup Ct, NY County

Docket Number: 108280/08

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **EMILY JANE GOODMAN**

PART 17

Index Number : 108280/2008

FABRIZI, RICHARD

vs
VERIZON NEW YORK

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

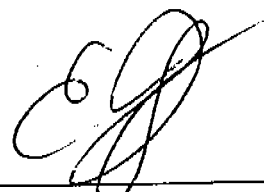
Upon the foregoing papers, it is ordered that this motion *and cross motion are*
decided as attached

FILED

JUN 09 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/6/11



EMILY JANE GOODMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X
RICHARD FABRIZI,

Plaintiff,

-against-

1095 AVENUE OF THE AMERICAS, L.L.C.,
VERIZON NEW YORK, INC., J.T. MAGEN
CONSTRUCTION COMPANY, INC., TISHMAN
CONSTRUCTION CORPORATION, and
DECHERT LLP,

Defendants.

-----X
NY-1095 AVENUE OF THE AMERICAS, L.L.C.,
S/H/A 1095 AVENUE OF THE AMERICAS, L.L.C.,

Third-Party Plaintiffs,

-against-

DECHERT LLP,

Third-Party Defendant.

-----X
DECHERT LLP,

Second Third-Party Plaintiff,

-against-

FOREST ELECTRIC CORP.,

Second Third-Party Defendant.

-----X
EMILY JANE GOODMAN, J.S.C.:

In a case involving a conduit pipe which fell from the ceiling, crushing an electrician's thumb, defendants NY-1095 Avenue of the Americas, L.L.C., s/h/a 1095 Avenue of the Americas, L.L.C. (1095), and J.T. Magen Construction Company,

Index №.: 108280/08
Motion Seq. No. 002

Decision and Order

FILED

JUN 09 2011

NEW YORK
COUNTY CLERK'S OFFICE

Inc. (Magen) move, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims as against them.¹

Plaintiff cross-moves for partial summary judgment against defendants 1095, Magen, and Dechert on the issue of liability under Labor Law § 240 (1).

BACKGROUND

On March 20, 2008 plaintiff Richard Fabrizi, an electrician employed by second third-party defendant Forest Electric Corp. (Forest), was relocating a pool box on the 11th floor of a building located at 1095 6th Avenue in Manhattan (Plaintiff's Deposition, at 30). More generally, the project involved a "gut and remodel" of the building (*id.* at 110). The pool box, a device used to access telecommunication wires, was connected to a section of conduit piping running down from the ceiling, as well as one running up from the floor. Chris Porcello (Porcello), a project superintendent for Magen, the general contractor, testified that moving some pool boxes was necessary to accommodate other riser conduits, as the initial core cuts, or holes in the floor which allow the conduits to run up through the building, were insufficient and incorrectly placed (Porcello's Deposition, at 37).

¹ On October 10, 2010, the parties filed a stipulation discontinuing the third-party action against Dechert LLP (Dechert). While Dechert submits a memorandum of law urging dismissal of plaintiff's complaint, it has not moved the court for such relief.

After cutting the conduit to remove the pencil box, plaintiff kneeled down to place a new core cut in the floor, in order to reposition the conduit and its pencil box, and to allow space for their Kindorf support to run through the floor (Plaintiff's Deposition, at 54-55).

The piece of conduit which hung above plaintiff as he worked with the hammer drill was approximately four inches in diameter and eight to 10 feet long, made of galvanized steel, and plaintiff estimated that it weighed between 60 and 80 pounds (Porcello's Deposition, at 24-25; Plaintiff's Deposition, at 51, 105). The conduit was attached to another piece of pipe by a compression coupling at the ceiling. Plaintiff testified that, in his experience as an electrician, compression couplings are less secure and more dangerous than another method of securing pipes known as a set screw coupling (Plaintiff's Deposition, at 36-37). Although plaintiff and his partner asked for set screw couplings, so that they would be safer as they worked on the pipes, none were made available to them (*id.*).

As he worked underneath the conduit suspended by the compression coupling, it fell on his hand, crushing the bones in his thumb and severing his tendon (*id.* at 64).

Plaintiff's complaint alleges that defendants are liable to him under common-law negligence, as well as Labor Law §§ 200, 240 (1), and 241 (6).

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'regardless of the sufficiency of the opposing papers'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Labor Law § 200 and Common-Law Negligence

1095, the building owner, and Magen, the general contractor, argue that plaintiff's Labor Law § 200 and common-law negligence claims should be dismissed, as they did not have supervisory control over his work.

Section 200 of the Labor Law "codified the common-law duty imposed upon an owner or general contractor to provide construction site workmen with a safe place to work" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

Where the alleged failure to provide a safe work place "arises from the contractor's methods and the [defendant] exercises no supervisory control ... no liability attaches to the owner under the common law or under Labor Law § 200" (*Comes v New*

York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]). The control owners or general contractors must have in order to be liable for dangers that arise from the method of the work is the "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998] [internal quotation marks and citation omitted]). Thus, "[g]eneral supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [defendant] controlled the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, "a [defendant] may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition" (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009] [internal quotation marks and citation omitted]; see also *Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675 [1st Dept 2010]). In this circumstance, "whether [defendants] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims ... " (*Seda v Epstein*, 72 AD3d

455, 455 [1st Dept 2010]).

1095 and Magen characterize the defect as arising from plaintiff's method of work, and submit plaintiff's deposition, in which he states that no one, outside of his superiors at Forest, had any control over his work (Plaintiff's Deposition, at 91-92, 102). In the alternative, 1095 and Magen argue that, even if the hanging conduit, supported only by a compression coupling, was a dangerous condition of the work site, then they are still not liable because they did not have notice of the condition, as it only existed for 15 minutes before the accident.

In opposition, plaintiff does not address his Labor Law § 200 and common-law negligence claims. 1095 and Magen make a prima facie showing by submitting plaintiff's deposition, which demonstrates that 1095 and Magen did not have control over the method of plaintiff's work, and, even if considered a defective condition, the evidence establishes a lack of notice. Plaintiff fails to rebut this showing. Thus, 1095 and Magen are entitled to summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against them. As no defendant had supervisory control over plaintiff's method of work, the court, pursuant to CPLR 3212 (b), the Court dismisses plaintiff's Labor Law § 200 and common-law negligence claims.

Labor Law § 240 (1)

1095 and Magen contend that plaintiff's Labor Law § 240 (1)

claim should be dismissed, as the accident was not gravity-related, and plaintiff was not in the process of hoisting or securing the conduit when it fell on his thumb. Plaintiff argues that he is entitled to the protection of the statute, and partial summary judgment as to 1095 and Magen's liability under it, as the conduit presented a gravity-related risk from which he was not properly protected.

Labor § 240 (1) provides, in relevant part:

All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]).

While "[n]ot every worker who falls at a construction site, and not any object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1)" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288 [2003] [internal quotation marks and citation omitted]), the statute "is

to be liberally construed" to accomplish its purpose of better protecting "work[ers] engaged in certain dangerous employments" (*Sherman v Babylon Recycling Ctr.*, 218 AD2d 631, 631 [1st Dept 1995] [internal quotation marks and citation omitted]). The First Department, following the lead of the Court of Appeals, has recently noted that "courts have historically read Labor Law § 240 (1) too narrowly" and that "'the breadth of the statute's protection has ... been construed to be less wide than its text would indicate'" (*Harris v City of New York*, 83 AD3d 104, 108 [1st Dept 2011], quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]).

As to the elevation requirement, a plaintiff is not entitled to the protections of this section unless his injuries "were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner*, 13 NY3d at 603). While Labor Law § 240 (1) claims are typically grouped into "falling worker" and "falling object" cases, "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*id.*).

In the falling object context, the Court of Appeals has held that a steel traffic plate, raised perpendicular to the ground by a backhoe, with its edge touching the ground, that toppled onto

the foot and shoulder of a worker, did not implicate a significant elevation difference (*Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911 [1998]). Similarly, the First Department has held that a transformer which fell less than two feet onto a worker's head did not trigger liability under Labor Law § 240 (1) (*Makarius v Port Auth. of N.Y. and N.J.*, 76 AD3d 805, 807 [1st Dept 2010]). However, "the weight of the falling object and the amount of force it was capable of generating, even over the course of a relatively short descent" must be taken into account" (*Harris*, 83 AD3d at 110, quoting *Runner*, 13 NY3d at 605).

As to what constitutes adequate protection from falling objects, the Court of Appeals has held that liability arises "only when there is a failure to use necessary and adequate hoisting or securing devices" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]). However, liability "is not limited to cases in which the falling object is in the process of being hoisted or secured" (*Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758-759 [2008]; see also *Outar v City of New York*, 5 NY3d 731 [2005]; *Stawski v Pasternack, Popish & Reif, P.C.*, 54 AD3d 619, 620 [1st Dept 2008] [a cinder block that fell from an open cavity gave rise to liability under the statute]).

Here, plaintiff was subject to an elevation risk, as the conduit was hanging several feet above him, and its 60-80 pounds

was capable of generating a great deal of force in its descent towards plaintiff's thumb. As the conduit was disconnected from the Kindorff support and only attached to the ceiling by a compression coupling, and because it fell, it was not secured as to give plaintiff proper protection. Plaintiff makes a prima facie showing of entitlement to judgment as a matter of law by submitting his own deposition, which shows he was subject to an elevation risk and was not afforded proper protection.

1095 and Magen are incorrect that plaintiff's Labor Law § 240 (1) claim fails because he was not hoisting or securing the conduit at the time of his accident. As *Quattrocci*, *Stawski*, and *Outar* make clear, liability under this section is not limited to cases in which the falling object was in the process of being hoisted or secured. The question is instead whether the conduit "required securing" while plaintiff was drilling a hole in the floor beneath it (*Outar*, 5 NY3d at 732). Liberally construing the statute to accomplish the purpose of protecting workers from gravity-related dangers, the answer is yes. No safety device was placed and operated to guard plaintiff from the unchecked speedy descent of the conduit pipe. 1095 and Magen, moreover, fail to raise a question of fact as to whether the compression coupling afforded plaintiff protection from the danger posed by the pipe hanging over him.

Thus, 1095 and Magen fail to rebut plaintiff's showing, and

plaintiff is entitled to partial summary judgment as to 1095 and Magen's liability under Labor Law § 240 (1). As a consequence, the branch of 1095 and Magen's motion which seeks dismissal of plaintiff's Labor Law § 240 (1) claim as against them must be denied.

Plaintiff also moves for partial summary judgment against Dechert, 1095's lessee on several floors of the building. Under section 240 (1), the term "owner" includes owners in fee, as well as "a 'person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit' [citation omitted]" (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 339 [1st Dept 2005]; see also *Lynch v City of New York*, 209 AD2d 590, 591 [2d Dept 1994] ["owner" includes "those entities with interests in the property which have the right, as a practical matter, to hire and fire the subcontractors and to insist that proper safety practices are followed"]; *Frierson v Concourse Plaza Associates*, 189 AD2d 609 [1st Dept 1993] [same]).

The Court of Appeals has recently noted that while Labor Law § 240 (1) places a duty on "contractors and owners and their agents," that "does not necessarily mean lessees can never be liable" (*Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009]). Accordingly, a lessee may be subject to Labor Law § 240 (1) (see *Bart v Universal Pictures*, 277 AD2d 4, 5 [1st Dept 2000] ["The statute (Labor Law § 240 [1]) may also apply to a lessee,

where the lessee had the right or authority to control the work site. . . one way to prove such control of the work site is through evidence that the lessee actually hired the general contractor"]; *Tate v Clancy-Cullen Storage Co.*, 171 AD2d 292, 295 [1st Dept 1991] ["A lessee in possession is deemed an 'owner' or 'agent' of the owner within the meaning of (section 240 [1]) and will also be cast in liability for any accident resulting from a violation of the nondelegable duties which the statute imposes"]).

Here, plaintiff makes a prima facie showing that Dechert is liable for purposes of Labor Law § 240 (1) by submitting the lease between the two, as well as the contract by which Dechert hired Magen as the general contractor. Dechert fails to contest this evidence or rebut this showing. Thus, plaintiff is also entitled to partial summary judgment as to Dechert's liability under Labor Law § 240 (1).

Labor Law § 241 (6)

1095 and Magen argue that plaintiff's Labor Law § 241 (6) claim against them must be dismissed, as plaintiff fails to allege an applicable violation of the Industrial Code.

Labor Law § 241 (6) provides:

All areas in which construction . . . work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

The Court of Appeals has held that this section requires owners and contractors "to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). This duty is nondelegable and it exists even in the absence of control or supervision of the worksite (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d at 348-349). "Nonetheless, comparative negligence remains a cognizable affirmative defense to a section 241 (6) cause of action" (*St. Louis v Town of North Elba*, 16 NY3d 411, 414 [2011]).

To support a claim under section 241 (6), plaintiffs must allege a violation of an applicable Industrial Code regulation which "mandate[s] compliance with concrete specifications and [does] not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009]). Violation of the regulation must also be the proximate cause of the plaintiff's injury (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007]).

Plaintiff argues that defendants violated 12 NYCRR 23-2.5 (a) (1). Section 23-2.5 of the Industrial Code is entitled "Protection of Persons in Shafts," while subsection (a) (1) applies to shafts other than elevator shafts, and requires that workers in such shafts be provided with:

Protection from falling material. A tight covering consisting of planks at least two inches thick full

size, exterior grade plywood at least three-quarters inch thick or material of equivalent strength shall be installed so as to cover the entire cross-sectional area of the shaft. Such cover shall be located at a point in the shaft not more than two stories or 30 feet, whichever is less, above the level where persons are working.

Defendants are correct that this rule is inapplicable. The 11th floor of the building where plaintiff was working is not the type of opening requiring "Protections of Persons in Shafts". As such, the branch of 1095 and Magen's motion which seeks dismissal of plaintiff's Labor Law § 241 (6) claims as against them must be granted. Additionally, as plaintiff is unable to identify an applicable violation of a sufficiently concrete Industrial Code rule, the Court, pursuant to CPLR 3212 (b), dismisses plaintiff's Labor Law § 241 (6) claims.

CONCLUSION

Based on the foregoing, it is

ORDERED that defendants NY-1095 Avenue of the Americas, L.L.C., s/h/a 1095 Avenue of the Americas, L.L.C. and J.T. Magen Construction Company, Inc.'s motion for summary judgment is granted only to the extent that plaintiff's common-law negligence, Labor Law § 200, and Labor Law § 241 (6) claims are dismissed; and it is further

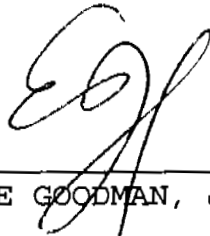
ORDERED that plaintiff's cross motion for partial summary judgment as to defendants NY-1095 Avenue of the Americas, L.L.C., s/h/a 1095 Avenue of the Americas, L.L.C., J.T. Magen

Construction Company, Inc., and Dechert LLP's liability under Labor Law § 240 (1) is granted; and it is further

ORDERED that the parties appear for a pretrial conference on 7/28/2011 in Part 17 Room 422 at 60 Centre Street.

Dated: June 6, 2011

ENTER:



Hon. EMILY JANE GOODMAN, J.S.C.

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